No. 03-1434

Supreme Court, U.S.
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In The Supreme Court of the United States

NIELS LAUERSEN,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner brings to attention of this Honorable Supreme Court of the United States the recent decision of Blakely v. Washington, No. 02-1632, Argued March 23, 2004 - Decided June 24, 2004.

Rule 44.2 requires the stringent rule that petitions for rehearing shall be limited to intervening circumstances of a substantial and controlling effect or to other substantial grounds not previously granted.

I. Intervening Circumstances

The Blakely decision is exactly on point with Lauersen and an intervening circumstance described above. A direct conflict exists between the decision of the court of appeals for the Second Circuit and every other circuit and this new decision of the Supreme Court. This is very strong ground for granting this petition for rehearing. Rule 10(c).

A. Direct Conflict

The holding in Blakely states: "Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury.

Lauersen was found guilty by a jury, of facts determined beyond a reasonable doubt legally essential to a base offense sentence of level 6. The judge *sua sponte* determined fact needed legally to

enhance the sentence to level 33 under the United States Sentencing Guidelines (U.S.S.G.). These facts include: (1) a thirteen level upward adjustment pursuant to U.S.S.G. § 2F1.1(a) based on $4.9 million intended loss; (2) a two-level upward adjustment pursuant to § 2F1.1(b)(2)(B) more than minimum planning; (3) a four-level upward adjustment pursuant to § 2B1.1(a) role in the offense; (4) a two-level upward adjustment under § 3B1.3 for abuse of trust of victim insurance companies; (5) a two-level upward adjustment pursuant to § 3C1.1 based on obstruction of justice; (6) a four-level upward adjustment under § 2F1.1(b)(8)(B) for "affected a financial institution". The final sentencing range due to the specific fact finding by the judge instead of the jury increased Lauersen's sentence from probation to between 135-168 months. This violated the right to jury determination of facts essential to his sentence of the Sixth Amendment.

B. Apprendi v. New Jersey

The Blakely case is an extension and upholding of Apprendi v. New Jersey, 530 U.S. 466 (2000), "....any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant statutory maximum for Apprendi purposes is the maximum a judge may impose based solely on the facts reflected in a jury verdict. The Blakely decision disallowed judge found facts for exceptional sentencing because the facts found in the guilty plea were different than facts required by Washington law for exceptional sentencing.

Similarly in Lauersen, the judge determined facts, not found by the jury in their verdict, to enhance the sentence in violation of the Sixth Amendment. The jury's verdict alone did not authorize this 27 level enhancement of Lauersen's sentence constitutionally under the U.S.S.G. Both cases are sentenced under statutory maximums but above jury determined guidelines.

The Apprendi case was a state criminal case as is Blakely. The precedent set in both affects federal case law. This Honorable Supreme Court stating that the Federal Guidelines are not before us, and we express no opinion on them still cannot ignore the constitutional ramification these decisions have on Lauersen.

This Honorable Supreme Court's commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of trial by jury. Lauersen is about determinate sentencing and the effect of judicial fact finding and its implementation in violation of the Sixth Amendment along with the strict division between judge and jury.

CONCLUSION

This court should grant this petition due to the massive amount of litigation the Blakely decision will surely ensue on the federal level. Granting certiorari and either vacating the decision below with remand to sentence in accordance with the Blakely decision or reversing the judgment summarily on the authority of

this intervening decision, unless this Honorable Court desires fuller consideration by briefs on the merits, will provide much needed guidance and direction for judicial economy of the courts below.

Granting certiorari will prevent the misconstruing, misapplication, or misconception of this applicable, soon to be quintessential Supreme Court precedent. The granting of this petition will also provide guidance for Dr. Lauersen's resentencing to increase his sentence unconstitutionally again under the Second Circuit ruling from which he appeals. These implications created under Blakely are in need of clarification under federal jurisdiction.

CERTIFICATE OF PRO SE PETITIONER

Petitioner pro-se certifies that the above Supplemental Brief is presented in good faith and not for any delay and is restricted to the grounds specified in Rule 44.2.

Respectfully Submitted,

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